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FROM THE ARCHIVES – how Töben's legal persecution progressed

A Letter to the Human Rights and Equal Opportunity Commission

Commissioner Zita Antonios
HREOC,
GPO Box 5218
Sydney 1042
25 August 1997

Dear Commissioner Antonios

Thank you for your letter of 11 August wherein you respond to some of the contents of my 26 May 1997 letter addressed to the commission.

I accept your apology for responding so late and appreciate you giving me your reasons why you referred Jeremy Jones' complaint about Adelaide Institute's website directly to a public hearing rather than through the normal channels of first initiating a conciliation conference.

With Sir Ronald Wilson's recent departure as president of the HREOC I suppose there is some soul-searching going on by those whose future at the commission does not look too secure. I say this in view of Sir Ronald 's much publicised love of being politically correct, as well as the Liberal government's intention to wind down the HREOC.

It is because of this latter fact that I have quickly submitted to you my complaint against Jeremy Jones, which I do formally below.

Complaint against Jeremy Jones

I wish to lodge a formal complaint against Jeremy Jones as an individual (private address unknown, c/- Executive Council of Australian Jewry, 2/146 Darlington Rd, Darlington – 2010) who has been one of Australia's leading anti-German campaigners for a long time.

His writings and public utterances on radio and television are causing a great deal of distress for Australians of German descent. Anyone who responds and opposes Jeremy Jones' vicious and outrageous statements is immediately branded by him as 'antisemite', 'hater', 'anti-Jewish', 'racist'.

Only last Sunday, 24 August 1997, 6.10pm on the ABC-Radio program, The Spirit of Things, Jeremy Jones threatened and intimidated individuals with his talk when he said on-air how he would like to deal with his critics: 'We must stop them from functioning'.

It appears to me that Jeremy Jones' actions constitute "a public act", which is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" and "is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group".

Kindly expedite this matter.

Sincerely

Fredrick Töben

Here is the overseas trigger publicised a year earlier by the media that set the stage for legal persecution executed locally by Jeremy Jones:

FRIDAY, JULY 5, 1996 Courier Mail (Brisbane) p.7

Jews trace cyberspace 'hatred' to Australia

By **RODNEY CHESTER** and **RORY CALLINAN**

THE Federal Government is investigating two controversial Australian-based anti-semitic Internet sites after an alert from international Nazi hunters, the Simon Wiesenthal Centre.

The centre, renowned for its dogged pursuit of hundreds of Nazi war criminals, detected the controversial sites as it followed the trail of far-right groups into cyberspace.

After locating the sites earlier this year, the centre wrote to the Australian Embassy in Washington calling on the Attorney-General to investigate if the sites breached any local laws.

The sites, one calling itself the Adelaide Institute and the other the Al-Moharer Al-Australi, target Jewish people.

Information downloaded from the Adelaide Institute says: "We are a group of individuals who are looking at the Jewish Nazi holocaust.

"We are worried about the fact that to date it has been impossible to reconstruct a homicidal gas chamber."

Al-Moharer Al-Australi says it "wants to challenge all forms of New World Order conditioning and thought control".

Wiesenthal Centre associate dean Abraham Cooper, speaking from its Los Angeles headquarters, said many "hate" groups around the world had taken to the Net in the past 18 months to reach a potential audience of 40 million.

Rabbi Cooper said there were about 100 Web sites around the world promoting "hatred and mayhem".

"It is an unprecedented but powerful tool that not only can be used for good but also be used for evil," he said.

"Our experience has been that the authorities don't even understand the technology that well."

Rabbi Cooper said there had been numerous cases in the United States where "very bright" students had downloaded bomb-making recipes off the Net.

One science teacher in Miami "was about one second away from blowing up both himself and his school", he said.

The centre, which uses the Web to promote its own cause, has set up a cyberwatch programme "not because we are opposed to computers but because we're committed to human rights".

Adelaide Institute director Fredrick Toben said last night: "We would welcome any investigation.

"But we would also like them to investigate Rabbi Cooper and the tradition that he comes from, namely from the Babylonian Talmud which is the ethical base that he operates on.

"It is used by a certain member of the Jewish community as a guide and the Babylonian Talmud is full of filth and hatred so let him (the Rabbi) cast the first stone."

A spokesman for federal Attorney-General Daryl Williams confirmed the office had received the letter and claims were being investigated.

Queensland Jewish Board of deputies president Laurie Rosenblum said he regularly received complaints from Queenslanders about material on the Internet.

He said there was urgent needed to censor the Net.

"The problem is that you have got this technology where some extremist organisation can print out stuff and transpose it and then hand it out or publish it in a newsletter," he said.

The Australian Broadcasting Authority is expected to release its guidelines on control of the Internet today.

Executive Council of Australian Jewry

הועד הפועל של יהודי אוסטרליה

The Representative Organisation of Australian Jewry

2nd Floor
146 Darlinghurst Road
Darlinghurst NSW 2010
Australia
Tel (02) 9360 5415
Fax (02) 9360 5416
E-mail aip@tmx.mhs.oz.au
http://www.join.org.au/ecaj

10 October 1997

Ms Anne Horvath
Legal Officer
HREOC
GPO Box 5218
SYDNEY NSW 1042

Fax: 9284-9611

Dear Ms Horvath,

Jeremy Jones on Behalf of the Executive Council of Australian Jewry -v-
Dr Fredrick Toben on behalf of Adelaide Institute
Inquiry under the Racial Discrimination Act 1975 (Cth)

Further to your letter of 1 October 1997, Ref: H97/120:AH, following is the "Relief Sought by the Complainant" document as requested.

Yours sincerely,

Jeremy Jones
Executive Vice-President

cc: Fredrick Toben
Fax: 08-8332-2908

Jeremy Jones on behalf of the Executive Council of Australian Jewry -v- Adelaide Institute
Inquiry under the Racial Discrimination Act 1975 (Cth)

RELIEF SOUGHT BY THE COMPLAINANT

1. A declaration that the Respondent has breached Section 18C of the *Racial Discrimination Act 1975.*

2. Order that the Respondent delete material identified as being in breach of the *Racial Discrimination Act* from the Adelaide Institute website on the Internet, and any other website published by the Respondent, where the offending material is presently accessible to members of the public.

3. Order restraining the Respondent from publishing or re-publishing the offending material or any other material the publication of which would contravene the *Racial Discrimination Act.*

4. Order that any website on the Internet which is or may hereafter be published by the Respondent permanently bear on its homepage the apology set out in Order 5 together with the following notation:

   "Public Notice
   Some of the material which has appeared on this website in the past has been found by the Human Rights and Equal Opportunity Commission to be in contravention of the *Racial Discrimination Act* an, in particular, those sections of the Act which prohibit incitement to racial hatred."

5. Order that the Respondent apologise to the Applicant in the following terms:

   "To Mr Jeremy Jones
   Executive Vice President
   Executive Council of Australian Jewry
   146 Darlinghurst Road
   Darlinghurst NSW 2010

   I hereby unreservedly and unconditionally apologise to you and to the Australian Jewish community for having published material inciting hatred against the Jewish people in contravention of the *Racial Discrimination Act*. I undertake that neither I nor any employee or agent of mine (actual or ostensible) will publish any such material in the future and that all such material which is presently published by me, or by any employee or agent of mine (actual or ostensible) in any print or electronic media (including the Internet) will forthwith be withdrawn from publication".

6. Order that the Respondent forthwith, and at his own expense, undertake a course of counselling by a conciliation officer of the Human Rights and Equal Opportunity Commission as to the rights and responsibilities of the Respondent under the provision of the *Racial Discrimination Act.*

Note:

a) In Orders 1, 2, 3 and 4 where the context so admits the word "Respondent" includes any employee or agent of the Respondent, actual or ostensible.

b) In these Orders the word "publish" includes any use of print or electronic media (including the Internet) to transmit material, and any derivative of the word "publish" shall have a corresponding meaning.

Human Rights and Equal Opportunity Commission

Ref.206418

9 October, 1997

Mr Frederick Toben
Adelaide Institute
P O Box 3300
NORWOOD SA 5067

Dear Mr Toben

I refer to your complaint under the Racial Discrimination Act 1975 ("the Act") against Jeremy Jones, and to the Commission's letter of 18 September 1997, to which, to date there has been no response.

If you wish to pursue this complaint, it would be appreciated if the details requested on 18 September 1997 could be provided within 14 days of the date of this letter. I enclose for your consideration a transcript, prepared by the Commission, of the interview with Jeremy Jones, which forms the basis of your complaint.

If you have any questions about any aspect of this matter, please contact me on (02) 9284 9656.

Yours sincerely

Mary O'Sullivan
Senior Investigation/Conciliation Officer

The Spirit of Things

Speaker Jeremy Jones
Vice President of Executive Council of Australian Jewry

Religious Freedom in Australia and Abroad
Racial Vilification Legislation

The Jewish community is in an fortunate position in one sense and that is that when anti-racism laws are generally interpreted, Jews are covered. In New South Wales where they have ethno religious vilification, Jews are covered further under that separate category. So we are in a situation where most of what is said about Jews or done to Jews is covered by anti-racist laws. But if you look at the sort of case we are concerned with you can see why this would be a concern to other groups. You have groups who are dedicated to spreading racial hatred or religious hatred or contempt for Jews who will publish material saying the Jewish religion recommends behaviour to its followers and to its members which is not only anti-social but goes against what we would regard as civilised standards. So it doesn't just present Jews or anybody else as doing something different it says these people are doing something destructive to you, they're trying to undermine your civilised values. Therefore the way you deal with them isn't by presenting a counter argument, what you have to do to your enemy whoever they may be is stop them from functioning at all.

How has the Jewish Community and other groups, in your knowledge, dealt with this kind of vilification because there obviously are existing laws and means that can address this kind of situation.

Well with the Jewish community and with anti-racist laws we are generally covered. But when we look at the situation of other communities it isn't nearly so straight forward. I can say horrific things about various Christian religions, various denominations within Christianity if I wanted to. I could stand up and totally misrepresent any of them and there would not be legal recourse by that religious group at all. I could depict a sect which has a very strong commitment to non violence as being a very violent sect if I so chose and there aren't laws that could deal with that.

Why would defamation laws not be sufficient to meet that kind of situation?

Because we don't have group defamation laws in Australia or group libel and I'm not saying it about an individual. The whole logic behind having religious vilification laws and racial vilification laws and laws to do with sexual discrimination and harassment are saying that it is a ridiculous situation if I can't say that person A is a criminal but I can say a group to which person A belongs is a criminal group. And this is the problem we have. For instance when somebody publishes material claiming the Jewish community are responsible for a particular crime, I can't, don't have a response generally or wouldn't have a response except for racial hatred laws even though clearly and publicly I'm identified as a member of the Jewish community. It is only because of the racial hatred laws that I have recourse. And if you're in the situation where you belong to a religious group which is not ethno religious or isn't in the situation of Jews which are close to a, not quite a unique case but basically a unique case as a people which fits the racial definition generally, then you don't currently have the recourse and for consistency sake it would seem valuable that if you do have racial

vilification laws to also have religious vilification laws.

Do you think though that religious vilification laws could stifle criticism that is justified about a group's practices or beliefs?

It's a problem which confronts anybody with framing legislation dealing with anything to do with speech as distinct from a physical type of action. Now I do believe speech hurts and I do believe speech has consequences. It's why you can't stand up in a crowded theatre and yell out fire, you are threatening public safety. You have to be aware of consequences of your words. When it comes to what can and can't be said we can look at how the racial hatred laws operate. There has been no indication whatsoever that there's been a cap put on debate about for instance immigration, or about crime in the various ethnic groups involved in any particular aspect of society. No cap's been put on under existing racial vilification laws and you wouldn't expect that to apply under religious vilification laws. The problem is, if the law is framed badly and if the law is administered badly, not with having those laws. But even more importantly, if we want to deal with religious vilification you can't only think of this as a legal situation because especially as, something very important that came up in the discussions down in the Melbourne conference, if you want to see who are the people vilifying religions, generally they're people from one religious community or another vilifying another. It isn't somebody generally, in the general public without an interest, saying this group is bad or that group is bad, it's somebody saying I belong to this group we are good. Further not only are we good but they are bad and they are evil for these reasons. So if somebody wants to say, Bhuddists shouldn't be entitled to build a temple, they don't say we know the truth, they say not only do we know the truth but they do something very bad at their temples.

Jeremy you've raised a number of problems there and one of them is who decides what is religious vilification or incitement to hatred and what is a justified criticism of a group's beliefs or practices the exposure of which may be in the public good, may be in the public interest.

That's the identical question that gets asked about sexual vilification and sexual harassment, racial vilification, racial harassment and when we look at the issue of religious vilification or religious harassment there's a huge difference between saying something which is a factual discussion of how a religious community views the world and how they respond to certain questions that might challenge them. That's one issue. Another issue is when you say something which is likely to bring people into contempt, which is not a legitimately held belief, which can't be defended on the basis of factual knowledge, there are all those sorts of questions. If we look at the Federal Racial Hatred Act for example, you can see that they not only allow a very strong standard of proof as a basis for somebody before they even have to defend themselves against the charge, but they also allow certain exemptions. Exemptions for instance, what is done in academic work, legitimate scientific work, matters which are legitimately within the public interest. Now these matters are then decided by a Court. There is, and I must say like, these exemptions haven't really been tested, they may be too strong. They may undermine the whole logic behind the law, we don't know that yet until they are tested. But whenever anybody is framing legislation like this they confront those exact problems and the best way I would say to deal with them is to say that nobody should be prevented from saying something that they can prove is not only true but is within the public interest.

It is interesting because religious vilification legislation can be used by individuals who perhaps have been forced to stop publishing hate but then have grouped themselves into a quasi religion, claimed to be a religion, hold those beliefs perhaps teach them and then claim protection under religious vilification legislation.

There is nothing to say that a religious teaching, which is in breach of the Racial Hatred Act, would no longer be in breach of the Racial Hatred Act, because it is a religious teaching of a group. In fact there's precedent to say that's not the case. So if you belong to a, the Klu Klux Klan, and you say within the Klu Klux Klan you are going to concentrate on teaching only aspects from the gospels which design to incite anti-Jewish hatred, you are still subject to anybody who is inciting hatred against Jews. The fact that you might be quoting one of the gospels is not a defence at law. So we do have precedent to say that wouldn't work for groups who might want to do that. But we do also have the anomaly or the difficulty that comes up all the time legally about definition of religious groups. There are groups that might be defined as religious by the Courts that the common person might say is, the Courts have been very generous. There are other cases where the common person might say the Courts haven't been generous but we live in a dynamic society where any decision by one Court can eventually be repealed or challenged in, we move on and (unfinished)

Indeed the legislation can be overturned.

Yes exactly. And that's why, although ten years ago a number of the main stream religious groups opposed legislation dealing with religious vilification because they thought it would only strengthen the hand of groups who they believed were misusing the term religion to spread something other than religion. I think the climate has changed a fair bit within Australia now where more and more of the mainstream religious organisations or the more established religious organisations are seeing religious vilification as something which is morally wrong and therefore they are changing their position on it.

While compiling this documentation it was not possible to find on the *Spirit of Things* website this particular episode for download.

Sunday 6pm*Repeated: Tuesday 1pm* Presented by Dr Rachael Kohn

- http://www.abc.net.au/radionational/programs/spiritofthings/- ed.]

Human Rights and Equal Opportunity Commission

Ref.206418

28 October, 1997

Mr Frederick Toben
Adelaide Institute
P O Box 3300
NORWOOD SA 5067

Dear Mr Toben

I refer to your complaint, dated 25 August 1997, under the Racial Discrimination Act 1975 ("the Act") against Jeremy Jones, who you describe as an anti-German campaigner. The complaint concerns a comment by Mr Jones, on an ABC Radio program, **The Spirit of Things**, broadcast on 24 August 1997.

A transcript of the relevant segment from the program was obtained by the Commission, and forwarded to you on 9 October 1997. In the program, Mr Jones is being interviewed about his views on religious vilification legislation. The following extract of the transcript contains the comment that forms the subject matter of this complaint:

> *"The Jewish community is in a fortunate position in one sense and that is that when anti-racism laws are generally interpreted, Jews are covered. In New South Wales where they have ethno religious vilification, Jews are covered further under that separate category. So we are in a situation where most of what is said about Jews or done to Jews is covered by anti-racist laws. But if you look at the sort of case we are concerned with you can see why this would be a concern to other groups. You have groups who are dedicated to spreading racial hatred or religious hatred or contempt for Jews who will publish material saying the Jewish religion recommends behaviour to its followers and to its members which is not only anti-social but goes against what we would regard as civilised standards. So it doesn't just present Jews or anybody else as doing something different it says these people are doing something destructive to you, they're trying to undermine your civilised values. Therefore the way you deal with them isn't by presenting a counter argument, what you have to do to your enemy whoever they may be is stop them from functioning at all."*

The underlined words are those that you have specifically complained of as constituting a breach of section 18C of the Act.

As indicated in the Commission's letter to you dated 18 September 1997, the above comment is not, on its face, one based on race, colour, national or ethnic origin.

Indeed, there is no reference in the transcript of the interview with Jeremy Jones to German people, or Australians of German descent.

I understand, from your correspondence of 8 October 1997, that you take exception to Mr Jones' comment, and that you disagree strongly with his views on a number of issues. You claim that the meaning of the words "*stop them functioning*" is unambiguous, and mean that Mr Jones is advocating the extermination of those who think differently. You further allege that Mr Jones equates questioning of matters pertaining to the alleged Jewish 'holocaust' as racial hatred, and is thereby expressing anti-German racism.

In the transcript of the radio program Mr Jones is speaking about religious vilification. He argues that there is a need for legislation dealing with such matters, for much the same reasons, in his view, as there are racial hatred or vilification laws. There is no reference to Germans or Australians of German descent, and the transcript does not provide a reasonable basis for the inference that Mr Jones is talking about such groups. The comment to which you have taken particular offence may be uncompromising, and I accept that you felt offended.

However, I must consider your complaint in terms of the requirements of the Act. Section 18C relevantly provides that it is unlawful to do an act, if the act is reasonably likely, in all the circumstances, to offend, or intimidate another person **and** the act is done because of that person's national or ethnic origin. In this case, I can find no, or no sufficient, evidence to substantiate your claim that Mr Jones' comment was one based on national or ethnic origin. Accordingly, I have decided not to continue to inquire into this complaint, as I think it is lacking in substance.

The Act gives you the right to have my decision reviewed by the Delegate of the President of the Commission. If you think my decision is wrong, you should respond, in writing, setting out the reasons why you think it is wrong, within **twenty-one days** of receipt of this letter and require me to refer the matter for review. If you have any questions about this process, please contact Ms Mary O'Sullivan on (02) 9284 9656. If I do not hear from you within this time frame, the Commission's file will be closed.

I note that in your letter of 8 October 1997 you refer, at points 2, 3 and 4, to articles by Jeremy Jones which, you allege, breach the Act. If you wish to make a complaint about any or all of those matters, please provide copies of the articles referred to so that the matters may be considered as complaints under the Act.

Yours sincerely

JKinross

Julie Kinross
Delegate of the Race Discrimination Commissioner

H:\DOCS\ACTS\RDA\TOBEN.LTR 23 October, 1997

Julie Kinross
Delegate of the Race Discrimination Commissioner
HREOC
GPOBox 5218
Sydney 1042

14 November 1997

Dear Delegate Kinross

Further to your letter of 28 October 1997 and to my telephone call of today to your Ms Mary O'Sullivan, I hereby request that your decision be reviewed.

As regards the comment in the final paragraph of your letter, I thought it was self-evident from my letter of 8 October 1997 that the material mentioned therein was submitted in support of my complaint. I have little interest in wasting my valuable time initiating another complaint against Jeremy Jones.

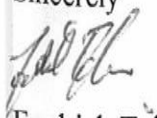
You say that Jeremy Jones' statement of which I have complained is "uncompromising". Would you not say the same about Mr Howard's expressed attitude towards the Human Rights Commission which he wishes to disband?
He, too, wants to stop them [the commission] from functioning, does he not? I would be most surprised to hear from you that you and all members of the HREOC are interpreting Mr Howard's intentions toward the commission as merely "uncompromising"? Your existence is at stake here!

Likewise with Jeremy Jones' statement. 'To stop someone from functioning' is indeed an expression of the speaker's "uncompromising" attitude. However, the words in their ordinary meaning quite clearly mean that a person who is stopped from functioning is stripped of all the qualities that make him human, namely the right to free speech and good reputation.

Jeremy Jones is a well-known supporter of the anti-German 'holocaust' promotion lobby which has succeeded in blurring the racial-ethnic-religious categories. He has thereby managed to be quite offensive towards me, for example as mention in point 3. of my 8 October 1997 letter.

As freedom of speech and reputation are the pillars on which our human rights rest, I insist that your take note of my complaint.

Sincerely



Fredrick Toben

My experience with two HREOC hearings leads me to conclude that the procedures are immoral because truth and justice have no home therein. Surely this fact reflects badly upon those who administer this flawed legislation. What follows is portion of a transcript from the **27 November 1997** telephone hearing:

Commissioner Kathleen McEvoy: My concern in this enquiry is to make a determination as to whether the material of which the complainant is complaining is material, first whether it is unlawful under Section 18C, but that's in essentially Mr Jones' hands, but secondly, if it is, whether it comes within the exemption of 18D.

So, essentially all of these witnesses must be able to demonstrate that the material is either said or done reasonably and in good faith in the course of any statement, etc. for any genuine academic, artistic or scientific purpose or any other genuine purpose of public interest.

Now, much of the material which you have provided me with in the witness statements, Dr Toben, is concerned to comment on the wisdom or validity or reasonableness of this legislation. That is not a matter on which I will hear any evidence. That is not a matter on which I can make findings. It is not a matter on which I am empowered to deal. So that any of your witness statements that are dealing with that aspect of your case will not constitute evidence that will come before this enquiry. That is not a matter that is before me.

Fredrick Toben: How can you disconnect yourself from a consideration…

KM: Because I am not part of the legislature, Dr Toben. This commission cannot enquire into the validity of legislation. If you wish to pursue the issue of the invalidity of the legislation, then you must do so elsewhere. It's not something which this enquiry can deal with.

FT: Commissioner, I've had a little bit of experience in court cases…

KM: Well, you're not in a court case, Dr Toben.

FT: I realise that.

KM: This enquiry is not constituted by a court exercising federal jurisdiction and it is not able to entertain an argument which is challenging the validity of laws. It is able to entertain arguments relating to statutory instructions, but not validity.

FT: I think you're misunderstanding me. I'm not challenging the law as such but I think you are at liberty to make a comment, are you not?

KM: I wouldn't regard myself at liberty to make comments about the desirability, validity, constitutionality or sensibleness of this law at all. I don't regard that as my function. I think it would be very inappropriate for me to do so, that it's not the function of a commissioner such as this.

FT: That's fine, but what about the subject matter itself, that the witnesses have to say, surely?

KM: Well, what I'm saying to you, Dr Toben, that insofar as the subject matter of a large amount of the material that is contained in the witness statement is concerned, with that issue, the issue of the validity, the sensibleness, the desirability, the democratic nature whatever else, insofar as it is concerned with that issue relating to the law itself, that is not evidence which is able to be put before me. That then moves us to the next aspect of many of the statements of the witnesses that you provided and that is the sense in which many of those statements are concerned with information about the content and process and detail of events in Europe concerning Jewish people in the 30s and 40s.

FT: Sorry, I didn't hear that.

KM: Now the substance of that is not something that I think is before me.

FT: Say again. Can you repeat that - I didn't follow that.

KM: Much of your material, much of the content of the witness statements is concerned not, it seems to me, with the substance that is before me under Section 18D but rather with the content of what you want to say, you know, what you want to establish under 18D is academic debate, that is, the truth of the Holocaust, the extent of the Holocaust, its existence. Now, the substance of that…

FT: …if you say the truth of the Holocaust, what do you mean by the Holocaust. We would have to define…

KM: …no, no, that's precisely the point I'm making. That is not something that is before me, in my view.

FT: Sorry?

KM: Now I'm happy to hear submissions on that but in my view the substance of that academic debate, its truth, its direction, what it might reveal, etc. is not what Section 18D is concerned with in that substantial sense.

FT: I don't believe this. I don't believe what I'm hearing. You mean to say that, that you are bracketing out the truth of the alleged Holocaust?

KM: No, what I'm saying to you is that my function is to conduct an enquiry into a complaint which is made to the commission. That complaint can only be in terms of the legislative provisions under this act and in particular the legislative provisions in 18C and 18D, the particular ones we're concerned with and my only function and my only power is to make a determination as to whether the material which it's alleged that you have disseminated on the website comes within the unlawful acts that are set out under Section 18C and if I'm satisfied that that is the case, I then have to turn my mind of whether nevertheless those acts, those things done or said come within the exemptions of 18D. Now to a large extent I don't believe the substance of these materials is going to be of much relevance to 18D because as I understand it, your argument is that those acts form part of a genuine academic, artistic or scientific statement, publication, discussion, debate or purpose or some other genuine purpose. If that is the case, its substance, it seems to me, in that context, is not of much significance.

FT: Commissioner, I'm a slow learner. I didn't quite follow what you really said because, what, my impression is that we have been criticised. Jeremy Jones has called me a Holocaust denier. Now, if he does that, then surely I have the freedom to bring forth material that will initially define the term, and

KM: I think, I think what you will need to do is to demonstrate that you can establish a defence by turning to the exemptions of Section 18D, that it is in the context of 18D.

FT: But have I not…

KM: …that I'll receive the evidence.

FT: But I have already done that by presenting my witness statements, with the time-line and all these books.

KM: Well, that's a, well, your, your, your witness statement of course is something which will then be tested when the enquiry proceeds. You've provided the evidence that you're going to give and that is what the enquiry will consider along with the other evidence that it will hear. I mean, it doesn't establish your defence. I might not accept the evidence you're giving.

FT: But Mr Jones has made a substantial complaint…

KM: Yes.

FT: Three subjects: The Talmud, Stalin-Lenin and the Holocaust - the three points, the Bolsheviks and so on - those three points. Now surely you cannot then say that the truth of the Holocaust or the contents of what I'm saying about it, that you're going to bracket this out?

KM: Well, I'm not bracketing anything Dr Toben. What I'm suggesting is that my concerns have to be addressed to the legislative provisions and all I need to be satisfied about, in order to accept your defence, and of course Mr Jones will have something to say about this, all I need to be satisfied by in looking at Section 18D is that what is alleged to have been done has been done reasonably and in good faith and as part of a statement, publication, discussion or debate made or held for any genuine academic etc. purpose. Now the content of the debate seems to me is only going to be relevant in a very minimal way. It is the existence of the debate and that your dissemination of this material is done in connection with it, which is what I have to make a decision about, and content in this sense is not of great substance.

FT: But, I think it's unbelievable. I must protest Commissioner because either I'm an extremely slow learner or I just, this is unexplainable. Last night, Commissioner, we had on TV in Australia for the first time *Schindler's List*, a film about the Holocaust, without commercials. Now, you mean to say that you are now going to look at this material that I submitted through my witness statements, and you're going to bracket out most of the stuff on the Holocaust?

KM: Oh, I'm sorry, I don't understand the relevance of television programs to this, frankly.

FT: You don't?

KM: No, I don't.

FT: If we're talking about academic, artistic, if we're talking about public interest.

KM: We're talking about it in relation to the material that you've put on the website and we're talking about it in relation to Mr Jones' complaint and both of those are only relevant under the legislation and in terms of this legislation.

FT: Commissioner, the complaint is substantial.

KM: Hmmhmm.

FT: And so is the defence.

KM: Certainly.

FT: So what's the problem?

KM: I'm not sure what the problem is at all. I'm simply trying to explain to you the basis on which I would now like to hear submissions about the witnesses whom you propose to call and give you some indications of the concerns I need to have in my mind when I make a determination as to whether and which witnesses are to be relevant.

FT: O.K. Perhaps we can, I'm slowly beginning to understand, using Professor Nolte's statement, maybe we can use that as an example to…

KM: Perhaps before turning to the specific statements I'll hear from Mr Rothman on this. Mr Rothman? Hello? Mr Rothman? Mr Rothman? Anne?

Anne: Yeah.

KM: Do you know if any problem has arisen there?

Anne: I wasn't aware that he's fallen out. If you hang on one second Commissioner I'll see if I can get him back.

[About 2 minutes later]

KM: Mr Rothman?

Stephen Rothman: That's right. I don't know where I left you off. I thought I was still talking to the conference caller.

KM: Well, what I was about to ask you to make some comments on Dr Toben's submissions, on this issue relating to what I regard a preliminary issue relating to Section 18D(b). I had been saying I thought to both of you but I think just to Dr Toben.

R: No, no, no, I heard all that you said up to that point.

KM: Oh, good, and then I, Dr Toben was then going to move on to talk about Dr, Mr, Professor Nolte's, the witness statement from Professor Nolte and I said I'd like to hear.

R: No, I heard all that.

KM: From your first, all right. Well, perhaps you'd like to talk to both of us then.

R: I, if it pleases, I heard all of that. When I started to make submissions that's when I must have been cut off. I won't make any comment about Telstra, but the, but they obviously have the good sense not to listen to me. What I was saying was, with respect, we agree with the initial proposition from the commission that the two issues that are before the tribunal, firstly whether the website falls within 18C, that's the initial complaint, whether it is offensive behaviour, I'm using it generally, offensive behaviour because of any race or ethnic origin

and then whether the, Dr Toben falls within one of the exemptions in 18D. Now, on the face of it it seems that the only exemption that could possibly be said to be relied upon by Dr Toben in light of what he's put forward is that that's contained in paragraph B. I note that he said earlier he relied on artistic but leaving aside submissions, it seems to me the only issue is whether there is a genuine academic, artistic or scientific purpose.

KM: Hmm.

R: What we say is, are there genuine purpose in the public interest has to be understood within those phrases in any event? But that's a matter for debate.

KM: Yes.

R: My point really is in extrapolation of what I understand the Commissioner is saying, that in that sense, much like the law of defamation, proof may be marginally relevant to whether or not something is genuine but of itself does not make for a defence and so to take a rather poor analogy, if, if, if a complaint was made against, for example, the Ku Klux Klan in Australia, if there's one, because they say blacks are inferior, they wouldn't have the forum in a matter before the Human Rights and Equal Opportunity Commission of arguing the fact that they aren't, that they are inferior.

KM: Yes.

R: The issue is only whether or not the statement is part of a genuine academic etc. purpose.

KM: Yes.

R: And we therefore, with respect, suggest, submit that a large account of the evidence that is put forward by Dr Toben is on that basis irrelevant, is either irrelevant because it addresses freedom of speech which is an issue that the legislature has dealt with and enacted the, the, the legislation, or it addresses the truth or otherwise of the existence of the Holocaust and we say that the mere fact that a thousand people say the Holocaust does not exist, does not make it a genuine academic, a statement made for a genuine academic purpose - I use academic to include all three of the issues.

KM: Yes, well, that's your answer to what Dr Toben is wishing to establish by his evidence and I mean you'll say that it doesn't establish, that it's a genuine academic debate.

R: My point, though, is that regardless of the submissions that we will make at the end of it, they're issues we'll deal with in the course of the proceedings, but we say it goes to the relevance of evidence that either firstly goes to the question of whether or not the law is a good law. That's not a matter that's before the tribunal.

KM: No.

R: And secondly, whether or not, included in that is the freedom of speech argument because that freedom of speech argument is actually resolved by the parliament in the making of 18D.

KM: Yes.

R: And also it goes to the question of material that go to the 'truth' of the Holocaust. The actual 'truth' of the Holocaust is irrelevant. What's relevant is whether there is a genuine academic debate from the point of view of 18D.

KM: Yes, sorry, did you have something else to say?

R: No, that's all.

FT: Can I comment on that?

KM: Yes, you can, Dr Toben.

FT: Firstly I think we're also relying on Section 18D(c) that's included in B, isn't it? I mean, where it says making or publishing a fair and accurate report and if that comment is the expression of a genuine belief held by the person making the comment. I mean that's my defence as well. I mean that need not be stated - it's obvious.

KM: Well, do you want to say anything about that, Mr Rothman?

R: Well, I didn't understand that that was one of his defences, but I still say, with respect, the truth of what occurred does not go to whether a report is fair and accurate and…

FT: May I?

KM: Well, let Mr Rothman finish first.

R: My point is that 18C is governed in that sense in the same way and in the same sense as 18B, and that 18C in some respects, in fact in most respects, is almost a particular of 18B, that is that it's intended to be a, first of all it has to be a matter of public interest. Secondly, it has to be a fair and accurate report. It goes to whether the report is fair and accurate. Fair in that sense, and accurate in that sense has to be understood in the terms of 18D, that is the whole legislation, and we say the issues are still the same. The question really is whether there is a report which is fair and accurate not whether the report is, is, is true. In other words…

KM: Not whether the report is a report of something that's true.

R: Yes, that's right.

KM: Yeah.

FT: May I?

KM: Yes, Dr Toben.

FT: You know when I listen to this, with all respect, Mr Rothman must surely have remembered from his time at the university studying law, that in the academic debate truth is a crux of any argument, and if he brackets this out, then we have nothing left but a hurt feeling.

KM: Oh, no, that's not, that's not, I think that's not quite the point that Dr…

FT: May I please continue?

KM: Yes, certainly (heavy sigh).

FT: If you are talking about genuine academic, artistic or scientific purpose, and if you then bracket out the truth, then you are damaging, you are not only damaging, it's a total disregard of the legislation and of the concept, the concept 'academic'. 'Academic' falls by the wayside if you don't have truth sitting there. I mean that's what the battle is all about in academia.

KM: Well, I think perhaps what academic debate means might be something on which I might be hearing submissions from both you and Mr Rothman. But my own view, subject to anything else you might want to add to that, is as I expressed before, and that is what Section 18D requires for the exemption to be established, is to establish that the acts that by the time we get to Section 18D or by the time I get to it in resolving this matter in the enquiry, by the time I get to 18D I would have found that under 18C that acts occurred and that they came within it because if I find that they didn't occur, then we never get to 18D. That 18D then requires that those acts, nevertheless, have been done reasonably and in good faith and in the course of any statement etc. held for any genuine academic etc. debate etc. That is, in my view the substance of that debate isn't of significance. What I need to be convinced of to apply Section 18D in your favour is that there is such a genuine debate. Now, the content of that debate in that sense is not, I think, something that is before this commission, and I think it would of course be absurd if it were and I think that that's something you acknowledge in one of your items of correspondence with the commission, Dr Toben, when you said that who was qualified to make a decision as to the truth of these things. Well, in that sense I'm inclined to agree with the point you make, Dr Toben, and that of course is part of the issue of academic debate.

FT: Commissioner, if I may interrupt, the whole issue, the substantial complaint makes so many statements, makes so many assertions - in fact it labels me as a racist.

KM: Hmmhmm.

FT: That I am a Holocaust denier.

KM: Hmmhmm.

FT: That I'm a hater.

KM: Hmmhmm.

FT: Now, in order for me to effectively defend myself, surely you must accord me the right of analysing the concepts that we use.

KM: Well, the concepts that I can analyse and the only concepts that I'm empowered to analyse, Dr Toben, are the concepts that are contained within this legislation. The complaint must be circumscribed by this legislation and the response is circumscribed by this legislation and my powers are circumscribed by it, that is, I don't think it is within my power to make a determination that you are or are not a racist. What it's in my power to do is make a determination as to whether you have committed acts which are unlawful under Section 18C of the Act and further make a determination as to whether those acts are nevertheless exempt from Section 18C because they come within 18D.

FT: And then they make me a racist if it's against me? Of course…

KM: I'm sorry, that's an interpretation you're placing on it. My function is an enquiry whether there's a breach of this Act not whether a particular label should be put on anyone at all which I would think quite an inappropriate thing for a commission to do and I certainly would not do.

FT: But then you would have to dismiss the substantial complaint.

KM: Well, that's the matter for the enquiry. That's a matter on which I shall make my decision when I've read the evidence.

FT: OK.

KM: And it may be that I will dismiss the complaint.

FT: You see, Commissioner, I'm slowly understanding.

KM: Good, good, All right. I think it is extremely important, Dr Toben, that you do appreciate that I cannot go outside the legislative prescriptions here. My powers are extremely limited and it would be most improper for me to hear evidence which I determine to be not relevant to this material - that's not relevant to the legislative material that I have here and that is how the enquiry is going to be circumscribed …

My Comment: Is it any wonder that I refuse to attend a HREOC enquiry when I know that its procedures are immoral, are legally flawed? I wonder how anyone can work within such a mentally and emotionally corrupting framework. No wonder Jeremy Jones did not wish to have a conciliation conference, and Zita Antonios saw to it that he got what he wanted - persecution through prosecution. He wants to force his belief about the Holocaust upon me - without respecting my moral values which cry out for truthfulness in this alleged historical subject matter!

Update: Contrary to her earlier decision, Commissioner McEvoy vacated the 15-19 December 1997 hearing dates until further notice.

Olga Scully Progress Report: Federal Court Judge Wilcox has requested written submissions from both Mrs Olga Scully and Mr Jeremy Jones by 19 January 1998.

Michael Barnard:
When freedoms become blurred

***The Sunday Herald Sun*, 7 December 1997**

A week tomorrow a commissioner of the Human Rights and Equal Opportunity Commission, sitting in Sydney, is due to begin hearing a case that cuts deep into the vexed issue of freedom of expression.

Broadly, the respondent - a former Victorian teacher now living in Adelaide - is accused of causing offence to the Australian Jewish community by publishing material questioning Nazi persecution of Jews during World War II.

There are, admittedly, other aspects to the complaint, brought under the Racial Discrimination Act, a section of which sweepingly enjoins against any behaviour "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people". But it is the revisionist issue, the challenging of central pillars of Holocaust history that will symbolically hold centre stage.

For years, it has been obvious that digging into once commonly accepted versions of World War II history is something that simply will not go away in Western culture and that the attraction the cause holds for various oddballs with anti-Semitic or other undesirable baggage does not wipe out the legitimacy of serious research.

New evidence, new questions, cannot be avoided. The downward adjustment of death rolls at Auschwitz following access to Soviet records after the collapse of communism is a case in point.

Yet the seeming pressure not to disturb original facts and figures relating to Nazi persecution of Jews seems unrelenting. In the words of Doug Collins, long-time Canadian writer-commentator who has himself fallen foul of the system, "to criticise in any way the version favored by Jewish organisations is to arouse anger and calumny. 'Revisionists' are called neo-Nazis, racists and anti-Semites."

In some cases, revisionists might deserve all they receive. In others, it can be far more complex. There is a process familiar to many arenas: a controversial issue is raised or assertion made, a bitter response follows, the first party comes back with even greater personal abuse and so on until the true focus is lost in a sea of personal vitriol.

It is a context to test even the best of tribunals. Where is the defining line of misconduct to be drawn? The answer, doubtless, is wherever racial or vilification legislation, always awesome if not downright dangerous in scope, allows it to be drawn.

This notwithstanding, and irrespective of the outcome, the Sydney hearing offers the Equal Opportunity Commission an excellent opportunity to define publicly its views on intellectual freedom and historical revision - not just as it relates to the Holocaust but as a broad principle to embrace other signal events in history where questioning or denial might cause pain to specific sections of the community.

For instance, in Russia, A History, just published in Britain by Oxford University Press, a collection of international authors radically minimise the number of Soviet citizens killed under Stalin's purges and reduce the infamous mass-starving of Ukraine's anti-collective peasants to a mere accidental outcome of poor harvests.

I can not accept a word of it, any more than I can accept that, despite convincing and sometimes substantial changes to detail, there was anything other than a mass slaughter of Jews and other target groups under Hitler's Nazi machine.

The point, however, is what is to be expected if someone publishes details of the new Soviet "truth" in Australia, with gratuitous insults about Ukrainians? Do we then start a new cycle of complaints?

Then someone can have a new bash at the Brits over the fire-bombing of Dresden, replete with injudicious comments about Poms not washing even when the world's on fire; to be followed by insults to Australian Cambodians in a Pol Pot revisionist corner, and so on.

At the end of such a day, which is worse? Tolerating cranks that mature people should be able to laugh off (or, if individually defamed, take to the criminal courts)? Or perpetuating laws that appear capable not only of exacerbating social divisions they are intended to avert but which, through the very nature of the process, place pressure on the free flow of, or search for, information that might be deemed socially inflammatory?

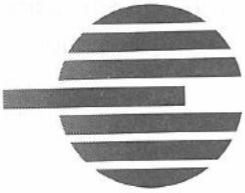
One answer can be seen in some of the bizzare proceedings that have unfolded overseas, including adoption in Germany of a law under which, as Collins points out, "even scholarly, critical examination of the Holocaust is called denial and is therefore forbidden on pain of imprisonment."

Some of the items of "relief" sought by the complainant at the Sydney hearing might raise eyebrows.

One asks the Commission to order that any website on the Internet which is or might later be published by the respondent should permanently, repeat permanently, bear on its homepage not only an apology but a notation that the respondent had, in the past, been censured by the Equal Opportunity Commission - a sort of enduring penalty which, to some, might smack just a little of the Nazi yellow star treatment.

Another is a request that the Commission order the respondent, at his own expense, to undertake a course of counselling by a conciliation officer of the commission. "Counselling" for deemed offenders is, of course, not new. But, oh dear, the symbolism. Roll over Winston Smith and bring on the rats. Or should that be, Roll over Beethoven and bring on Clockwork Orange?

Human Rights and
Equal Opportunity Commission



Our Ref: C. 206418 FC (R)

Mr Frederick Töben
Adelaide Institute
PO Box 3300
NORWOOD SA 5067

Dear Mr Töben

Re: Your complaint under the Racial Discrimination Act 1975 (Cth)

Please find enclosed my decision on your request that I review the decision of the Delegate of the Race Discrimination Commissioner (the "Delegate").

I realise that you will be disappointed with the decision but I assure you that I have given all your submissions careful consideration.

Your complaint stems from an interview Mr Jeremy Jones gave on 24 August 1997 on the ABC-Radio program "The Spirit of Things". Mr Jones was discussing the need for religious vilification laws similar to the racial vilification laws under which you have lodged this complaint.

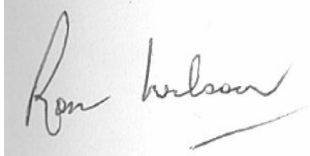
At one stage Mr Jones stated *"Therefore the way you deal with them isn't by presenting a counter argument, what you have to do to your enemy whoever they may be is stop them from functioning at all."* You have alleged this statement constitutes a "public act which is reasonably likely to offend, insult, humiliate or intimidate another person or a group of people and is done because of the race colour or national or ethnic origin of the other person or of some or all of the people in the group. That is, you have alleged Mr Jones' remark is in breach of section 18C of the *Racial Discrimination Act 1975* ("the Act").

I understand that you are very familiar with Mr Jones views and that you are in disagreement with them. I have no doubt that you found Mr Jones statement personally offensive. However, the purpose of section 18C of the Act is to offer protection to groups of persons who have been specifically targeted for racial abuse. I have read the transcript of Mr Jones' interview carefully and I note that at no point does Mr Jones specifically mention any one person or particular racial group. Indeed, Mr Jones use of the phrase "whoever they may be" clearly indicates that he is talking generally.

I can understand, given your history of dissension with Mr Jones' views that you may have personally *inferred* Mr Jones's statement to be a specific reference to the German people. However, such an inference is not sufficient to ground a complaint of racial vilification.

Given the above I have decided to confirm the decision of the Delegate not to inquire further into your complaint because I consider your complaint of racial vilification is lacking in substance. Your file will now be closed.

Yours sincerely,



Ronald Wilson
Delegate of the President

DATED: 5 January 1998.

German-hater Jeremy Jones fails to ambush and defame Fredrick Toben on Adelaide's ABC Radio 5AN, 30 March 1998

From Newsletter No 70 April 1998

When Radio 5AN's morning presenter, Richard Margetson announced to his listeners that Jeremy Jones would appear on his program to talk about an Adelaide-based hate Internet website it was a call from an interstate supporter that alerted Toben to this happening. Toben's first call to the station at 8.20 am was fruitless, then his second call at 8.30 am had the producer of the program place Toben on hold ready to participate in the live discussion. Although Margetson claims to have researched the topic, he failed to contact Toben for the program thereby offending against the principle of natural justice. Had it not been for the interstate supporter's call, then Jeremy Jones would have been free to do what he loves best: persecuting Toben and the Adelaide Institute by talking about their work without giving them a right of reply. No wonder Jones never wanted a conciliation conference during the HREOC proceedings. He must know that any of his arguments about the gassing story can swiftly be demolished. Adelaide Institute's mind-liberating work continues to stand proud because it does not rest on a foundation of inaccuracies, exaggerations, deception and lies. As 'foreign minister' of Australia's Jewish community, Jones is well-connected to Israel's secret service, Mossad. Perhaps we can win them over to organise a public debate between Jones and Toben.

Richard Margetson: Adelaide has a new marketing authority which is promoting art and culture and heritage, life-style, wine, food - all those positive things that we know happen in Adelaide. But Adelaide has other people unofficially promoting the city in a very different way. It may surprise you to learn that in some cities Adelaide has a well established reputation as the home of racial bigotry, extremism, neo-Nazism and anti-Semitism. Joining me now is a former Adelaide resident now a Sydneysider, Jeremy Jones. Jeremy is the director of Community Affairs for the Australia, Israel and Jewish Affairs Council, and Jeremy a very good morning to you.

Jeremy Jones: Good morning Richard.

RM: Jeremy, am I exaggerating a little bit much when I say Adelaide does have a really strong reputation as the home of racial bigotry, neo-Nazism and that sort of thing?

JJ: It's an exaggeration in one and it's not in another. It's just we have to remember that when we think of foreign places we may think of only one little aspect and that's the one we're most recently heard, one that sticks in our memory. So, for instance, we may think of Oklahoma as the site of a terrorist bombing while of course Oklahoma city is a lot broader than that. You may think of India as a scene of a cricket test when obviously the culture is much more diverse. And the thing with Adelaide is over the years - first there were the trials of Nazi war criminals or alleged Nazi war criminals taking place in Adelaide. Then there was the situation of National Action's very public activities based in Adelaide. But much more recently in the international, the global scene of the Internet one name which constantly comes up on sites of people who are looking at the most offensive material aimed at Jewish people in particular around the world to a site which has Adelaide in its title, and for that reason people who haven't heard much of Adelaide who wouldn't know what a pleasant place it is and live in or visit only, have the image of a place which is the base of someone who would spread what they argue is hate propaganda.

RM: In researching the story we've come across this world web site that we're talking about. It's called the Adelaide Institute. What do you know of that organisation?

JJ: Well, I have to be careful in the sense in what I say in that the Adelaide Institute is an Internet site maintained by an Adelaide resident with the assistance, I would guess, of a few people in Adelaide, his friends or colleagues, and that site in May 1996 - an advertisement appeared in The Australian newspaper inviting people to come and visit the site which was promising them new insights into world history, I guess would be a reasonable summary, and within three or four weeks the various Jewish bodies around Australia were receiving quite a number of phone calls and electronic mail communication from people who'd gone to that site and were deeply offended and insulted because what they had found on that site wasn't anything that could be regarded of legitimate research. It was nothing which was academic, nothing which was scientific but a great amount of what you could regard as very strong slurs against people who were Jewish and particularly against people who either suffered through the Nazi Holocaust or descended from people who suffered through it or died during the Nazi Holocaust.

RM: Seven-and-a half minutes to nine. 891, Adelaide's 5AN. We're speaking with Jeremy Jones, the director of the Community Affairs for the Australian, Israel and Jewish Affairs Council about a site called the Adelaide Institute and as such a surprise to us as to Jeremy no doubt is that Dr Fredrick Toben, who is the director of that institute, has just called in and we join him on the line this morning. Dr Toben, good morning to you.

Fredrick Toben: Good morning.

RM: Just first of all, I guess, we've just been hearing from Jeremy there about referring to your site as anti-Semitism, I guess in lots of ways, not legitimate, not academic, not scientific. What's your initial response to those types of claims?

FT: Well, Jeremy does nothing better than merely talk about me. He talks about me but he doesn't talk about the content I'm talking about and my challenge to him is, and I did this at the Writers' Week, I offered Norman Davies a thousand dollars to show me or draw me a homicidal gas chamber. Now this can't be done and instead he labels, libels me and says that I'm a Nazi or neo-Nazi or a racist or a hater and that is not good enough for me. This is defamatory because he will not come to grips with my challenge.

RM: Well, is the challenge such that you are denying the fact that a holocaust took place?

FT: Nobody denies the fact that millions of people died in terrible circumstances - Jews and Gentiles. What is being denied, not really denied, what I'm saying is - see, the problem goes back to this one little simple idea: the people who say that the Germans gassed millions of people in homicidal gas chambers, they're making an allegation against the Germans. They say that the Germans planned, constructed and used gas…

RM: And they would have to be said that there was a fair degree of historical evidence to show those things.

FT: Well, this is the problem. I came back from Auschwitz last year and I had a look at the alleged gas chamber and now it's been decommissioned. They say it was made to look like a gas chamber. This is in Krema I if anyone knows about this. Auschwitz is a complex of a number of different camps and…

RM: But we're talking about issues that without much, I mean, obviously where people can be mislead, but it's very hard to be mislead on the level that the world has been mislead on an issue of the Jewish Holocaust, surely?

FT: Nobody - you see when we use the word Holocaust we must define the term because nowadays anyone who suffered under the Nazis during the second world war can claim to be a Holocaust survivor if he's Jewish. Now that to me is using the concept Holocaust in the wrong way because…

RM: We'll just turn back to Jeremy Jones for the moment. Jeremy Jones, the director of the Community Affairs for Australian, Israel and Jewish Affairs Council. Jeremy, immediately you have to respond to those types of issues that the challenge has been thrown to you.

JJ: But this is hardly the forum for anybody to come to grips with some of the issues that have been raised.

RM: I guess so.

JJ: And what I want to say is that as I was saying before the telephone call was received, that in late 1995 the Australian federal government passed legislation called 'The Racial Hatred Act' and under that act any Australian has the opportunity to lodge a complaint against something which is a public act, reasonably likely in all the circumstances to offend, insult and humiliate or intimidate another person or a group of people, and is done because of the race, colour or national or ethnic origin of the person or of some or all of the people in the group. The point is that after that site was publicised, I have no idea how long it was in existence before it was publicised, the peak body of the Australian Jewish Community in discussion with all its constituents and affiliates decided to take the action of lodging the complaint with the Human Rights and Equal Opportunity Commission concerning the contents of that site. Now obviously this is a matter which has not yet come before public hearing. It has been a very lengthy process so far and there's been a great deal of correspondence exchanged. But the simple matter is the Jewish community representative organisations believe that this site falls into that category and that's why we have lodged a complaint. Now to talk about the particular issues or to try and have the sort of debates or discussions that Fredrick Toben's having at this point doesn't serve the purpose of understanding what the law is or what the complaint is at all.

RM: So a site such as the Adelaide Institute site, what is your response to it if it is classified, as you say, racial vilification, then should it be still in existence? This is where we get into the difficulty, I guess, of censorship of what's actually available to be read or seen.

JJ: Yea, it is a complex area and it's certainly not a black and white area and that's why in the Jewish community we don't go in very simply without giving it a great deal of thought before we would lodge a complaint under this particular act. But the simple matter is that if you have a right to free speech you also have a responsibility not to use that free speech in a way that it impinges on somebody else's rights to live their life free of vilification and intimidation. The part of the logic of having defamation law, having libel law, having laws about public comments which might endanger public safety is to say that free speech is a very important freedom but it's one of many and it's important that a society like ours works out the appropriate balance between those freedoms.

RM: OK, Jeremy Jones, we have to leave it there. Thank you very much for your time this morning and Dr Fredrick Toben we thank you also for your call this morning as well. 891 Adelaide's 5AN. It's thirteen minutes to nine.

Fredrick Töben's most recent communications with the re-badged HREOC the Australian Human Rights Commission:

Australian Human Rights Commission
Our Ref: F2012119
27 July 2012

Dr Frederick Toben
PO Box 3300
Norwood SA 5067

Dear Mr Toben,

Your request for documents made under the Freedom of Information Act 1982 (Cth)

I refer to your letter of 28 May 2012 in which you requested access to electronic copies of the original letters on the Commission file in the matter of Jeremy Jones and Frederick Toben that you submitted with your request in typed format, namely:
1. Frederick Toben to Zita Antonios, dated 25 August 1997;
2. Sir Ronald Wilson to Frederick Toben, dated 5 January 1998
3. A copy of the transcript mentioned in Sir Ronald Wilson's letter dated 5 January 2012
On 25 June 2012 pursuant to your request, you were provided with a copy of your letter to Commissioner Antonios dated 25 August 1997.
On 26 June 2012 you agreed to an extension of time to make a decision in relation to your request until 27 July 2012. The extension was to allow advice from National Archives Australia as to whether it had in its possession a file which I believed may have contained the original copies of the documents mentioned within your request. Unfortunately, I have been unable to locate the file and therefore pursuant to s 24A of the FOI Act access to the two remaining documents you have requested is refused.
Section 24A states that an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document and is satisfied that the document does not exist. I am authorised to make a decision under s 24A and I am satisfied that all reasonable steps have been taken to locate the documents in question and that they no longer exist.

Avenues of review

For your information, I also enclose information relating to your rights of review of the Commission's decision. Please call me if you have any questions in relation to this matter.
Yours sincerely,
Michelle Lindley
Deputy Director Legal
T 02 9284 9679
E michelle.lindley@humanrights.gov.au

Michelle Lindley
Deputy Director Legal
AHRC
3/175 Pitt St
SYDNEY NSW 2000
E: michelle.lindley@humanrights.gov.au
Your Ref: F2012/19

1 August 2012
Dear Michelle Lindley
Thank you for your letter dated 27 July 2012, which your Chris Rummery forwarded to me per email on the same day.
1. I note the content of your letter and note should I have any questions about this matter you invite me to contact you.
2. You state that after searching for a file that you believed may have contained the original copies of the documents I requested, you failed to locate the file. Your failure to locate the file then leads you to decide to refuse me access to the two documents of which I requested copies.
3. You then quote Section24A of the FOI Act to justify this refusal because your refusal is based on 'all reasonable steps have been taken to find the document', and you conclude that you are 'satisfied the document does not exist".
4. You conclude your reasoning process by stating that 'I am satisfied that all reasonable steps have been taken to locate the documents in question and that they no longer exist'.
5. I am amazed at the logical steps you have taken to reach that decision. It reminds me of my own reasoning process that your head, Catherine Branson, as a judge of the FCA in 2002 used when she gave me gag orders that prevent my talking and writing about something that never happened in reality, i.e. that some specific historical event has no reality in space and time, only in memory.
6. If you would like copies of the original documents I requested, then I would be happy to provide you with such copies. Surely, a letter from the former HREOC President, Sir Ronald Wilson, should be on file simply FOR THE HISTORICAL RECORD.
7. Finally, as you cannot locate the documents should you now not initiate an enquiry as to what happened to them, and what happened to the file wherein you thought you would find copies of the documents? After all, what we now have is perhaps a case of 'shredding government documents', which would be an illegal act. Perhaps you can continue to search for these documents.
Please advise.
Sincerely
Dr Fredrick Töben - **toben@toben.biz**

Terry Lane:
A big hammer for such a little nut

***The Sunday Age*, 14 October 2000**

The human rights and equal opportunities commissioner has ordered an Adelaide man, Dr Fredrick Toben, to change the contents of his website, or else.

Dr Toben is sceptical about the use of gas chambers by Nazis for the mass extermination of Jews. He says that it didn't happen, or is grossly exaggerated. And if that is what he sincerely believes, as offensive as some people may find it, how can he be forced to pretend that he doesn't believe it?

Are we to take it that the human rights commissioner is going to order every outspoken person who offends some group or other to desist and apologise? Will Philip Ruddock be forced to declare that Aborigines did invent the wheel? Or will Bill Hayden be compelled to retract his assertion that some Aboriginal children were better off separated from their parents?

Toben is saying on his website that he doesn't believe that the Nazis used gas chambers to murder Jews. He is making a claim of fact that can be proven or disproved by evidence. It does not need to be censored in advance of the argument.

However, we know all that. Some of us believe in the principle of free speech, even though it means that we must from time to time defend the rights of individuals whose speech is morally repulsive or even fantastic and mendacious. And some of us want to prohibit speech that offends or hurts, on pain of penalty for the persistent speaker.

As one who believes in the right of the citizen to be wrong and offensive, I am interested to know how the speech prohibitionists intend to stop the mouths of those they don't like. Can it be done in a free society? To what low level of thought control are we prepared to go?

In totalitarian nations where total control on ideas has been tried they have come up with novel mechanisms. In the old Soviet Union, you had to get a government licence to own a duplicating machine. But neither the Soviets nor the Chinese thought to impose proper controls on the fax, which led to things getting out of hand in the late 1980s.

Now we have the Internet, and Dr Toben's Adelaide Institute website appears to be located on an American server. The human rights commissioner will get short shrift if she appeals to the American administration to close down a website. They don't do that sort of thing in the USA because they believe that the good order of society is not threatened by a few people who choose to hold and disseminate improper opinions.

But suppose that the commissioner, Ms McEvoy, could persuade the Americans to revoke the first amendment to their constitution, she would not be able to leave it there. She would have to effect a total ban on Dr Toben speaking in public, or even having private conversations. He would have to be a banned person in the old South African sense of the term.

His mail would have to be censored, his telephone cut off, his computer and fax confiscated and all his friends, who might republish his ideas, locked up in solitary. Anyone holding similar opinions would have to be banned. Has she thought this thing through?

Some zealots who believe in free speech might think that, in the service of their convictions, they should re-publish the Toben website, not because we agree with it but because of the principle at stake.

German-born Dr Toben may be trying to clear his people's name. If a Japanese-Australian were to publish a revisionist history of WWII in which the Japanese Imperial Army is a bunch of softies, totally committed to prison reform, would the human rights commissioner ban it because the RSL petitioned her to? I think not.

If Toben is telling the truth, nothing will stop it. If he is a malicious fantasist, then he will be ignored. We should test his assertions, not silence them.

From our archived Newsletter No 119 November 2000.

Professor Arthur Butz:
The Greatest Dirty Open Secret

29 October 2000

In the trials and tribulations of Fredrick Töben one can observe in operation the greatest dirty open secret of our day. In explaining that remark here, I will do my best to be objective, despite the fact that because of the conditions I am to discuss several of my friends have been imprisoned or fined for doing the sorts of things I also do.

In October 1997 I received a request from Töben, director of the Adelaide Institute and a Holocaust revisionist, to be a defense witness for him in his hearings before the Australian Human Rights and Equal Opportunity Commission (HREOC). The role would have involved writing a letter for him and perhaps testifying by telephone from my home near Chicago.

I resisted this request, pleading a shortage of time and the fact that he had told me, earlier that year in Chicago, that the Australian "Human Rights" legislation has no teeth and that he did not have to pay any attention to such proceedings against him. Both pleas were true but I had another strong reason for my reticence, which was too complicated to state in these rapid-fire e-mail messages, but which can be explained here in due course.

In any case I relented after a few passionate e-mails from Töben. I wrote a two page letter, intended to be submitted to the HREOC hearings. The letter, dated 5 November, declared:

Alas I must say that you are arguably guilty of some of the charges. I looked over Jeremy Jones' stuff and I infer that the "Racial Discrimination Act" proscribes what might "offend, insult, humiliate or intimidate another person or group of people." Well, revisionism certainly does the first three! It does not however "intimidate"; at least, I have never noticed such a case. . . . Heated controversy is a price of open debate, the foundation of a rational society.

Jeremy Jones was the representative of the Hebraic organization that had brought charges against Töben. I commented on Jones' letter by declaring Töben guilty. Some defense witness!

Far from acting betrayed by me, Töben submitted the letter to the HREOC. I believe that he was starting to see my real reason for reluctance to get involved as a defense witness. Such matters as I had expertise in were irrelevant to the proceedings, which related not to historical truth, but to offending, insulting, etc.. For the most part I could not understand the notion of culpability as used in the proceedings, but to the extent that I could understand, Töben was guilty. I am at least as guilty, as are many of my revisionist friends. The situation was structured such that nothing I could have said would have helped attain a favorable verdict, as became clear to Töben shortly later.

On 7 December Töben ended his participation in the hearings, complaining that he was unable to defend the position of the Adelaide Institute because the HREOC was not interested in historical truth. The breaking point seems to have come when the Commission rejected the witness statement of Dr. Robert Faurisson as "irrelevant".[1] In a hearing conducted by telephone on 27 November, the Commission had told Töben that for the most part the witness statements he had submitted had to be disqualified either because (1) they "make comments about the desirability, validity, constitutionality or sensibleness of this law" under which the hearings were being held or (2) they comment on "the substance" of the historical problem, i.e. "the truth of the Holocaust, the extent of the Holocaust, its existence" which "is not of much significance" for the hearings.[2]

Of course these two questions are, to our common sense (or as Töben puts it our sense of "natural justice"), the only relevant questions. There is almost nothing left to be said if these two questions are excluded. I felt vindicated, because even the accused had decided to submit no defense. I could not be accused of failing him. Faurisson had written one of his usual masterfully incisive analyses of the historical problems, formulated for the layman, and his statement was rejected. The implicit effect of what I wrote was to question the law itself, but I declared Töben guilty so my statement was accepted. We may make the basic observation that it was impossible to determine what Töben was being charged with, apart from saying things that annoyed some people. The commission was not interested in the intentions behind Töben's public declarations, or in their actual effect.

This observation raises the general question of the legal formulations under which Holocaust revisionists are persecuted in various countries. For purposes of such a discussion, we can take two: the "Human Rights Act" (such an Orwellian term!) in Canada and the 1990 Fabius-Gayssot law in France. These two legislations do contrast sharply, but in practice they operate similarly, as I now explain.

In the Canadian case, the code excludes the relevance of three considerations:

1. The truth of the offending statements.
2. The intent behind the expression of the statements, e.g. whether they were intended to cause people to hate Hebrews.
3. The actual effect of the statements, e.g. whether they caused people to hate Hebrews, whatever the intent of the author.

We simple minded people will scratch our heads and wonder what is left to try. It is this: whether the statements "exposed" somebody to hatred or contempt.

It is impossible for me to clarify that standard because, to the extent I understand it, reference is being made to a condition into which all of us are born. Somebody may start hating us, and often does. Holocaust revisionists are hated more than most, but exposure to hatred is basically part of the human condition. One can be argued to be innocent of such an offense only in that sense, that is, that the condition referred to is a condition we are all in, independently of what statements are made by anybody. If that plea is unacceptable, then of course we are all guilty. Anybody may be hated in the future for all sorts of reasons. Witness human history.

By contrast, the French Fabius-Gayssot law is very clear. It proscribes contesting the truth of any finding in the "Crimes Against Humanity" section of the 1946 judgment in the main Nuremberg trial. It candidly expresses, without any tergiversation, what all legal moves against revisionists are trying to do: freeze received history in the state of the end of war hysteria of 1945-1946. This sort of law contrasts with the typical "human rights" legislation, since here there is no doubt what offense an accused is being charged with.

The Australian statute resembles the Canadian, and the formulation of the French law is approximated in Germany, with its "denial of established fact" clause. These are two starkly contrasting formulations and Töben may be unique in having been prosecuted under both, for as this book relates at length, in April 1999 he was jailed in Germany while travelling there.

That the two formulations have something important in common is suggested by what finally happened when Töben's trial came up in Germany in November 1999. Again, he decided to remain silent and offer no defense, and his lawyer did likewise. I commented on my web site:[3]

If I must conjecture the specific grounds for Töben's silence during the trial, I would guess that his protest is based on the impossibility of arguing the truth of any of the claims he has made, for which he is being prosecuted. I suppose in the court's eyes there is a certain amount of logic in that situation which, as so often happens, makes legal sense but not common sense. If e.g. there were a law outlawing the denial that Germany is on the planet Mars, and if I deny that Germany is on the planet Mars and am prosecuted for the claim, then the question of whether Germany is on the planet Mars is irrelevant to the question of whether I broke the law. Truth is no defense. In those circumstances I would adopt the strategy Töben adopted, silence, which for me would make both legal sense and common sense.

Thus the two contrasting formulations confront the accused revisionist with the same practical situation: the impossibility of seeking to justify the offending statements in relation to the accusations. Before a "Human Rights" tribunal, a Holocaust revisionist confronts unintelligible accusations. Under the French or German laws, the Holocaust revisionist is accused of being a Holocaust revisionist. If I had been a defense witness for Töben in Germany, I could not have helped him and indeed he could not think of anything to help himself. There was nothing for him to say, and nothing a defense witness could have effectively said in his support. Such court victories as revisionist defendants have won have been based on legal and constitutional technicalities.

Since western society has, for many years, made freedom of expression one of its highest values, the reactions of the civil liberties groups to this offensive and scandalous situation are of great interest.

Their reactions are equally offensive and even more scandalous. The leading (in terms of general prestige) international civil rights group is Amnesty International, headquartered in London. Amnesty has a designation, "prisoner of conscience", which it describes thus:[4]

"Prisoners of conscience" is the original term given by the founders of Amnesty International to people who are imprisoned, detained or otherwise physically restricted anywhere because of their beliefs, colour, sex, ethnic origin, language or religion, provided they have not used or advocated violence.

The concept of a prisoner of conscience transcends class, creed, colour or geography and reflects the basic principle on which Amnesty International was founded: that all people have the right to express their convictions and the obligation to extend that freedom to others.

The imprisonment of individuals because of their beliefs or origins is a violation of fundamental human rights; rights which are not privileges "bestowed" on individuals by states and which, therefore, cannot be withdrawn for political convenience.

Amnesty International seeks the immediate and unconditional release of all prisoners of conscience.

Early in Töben's German incarceration John Bennett, the Melbourne civil liberties lawyer, wrote to Amnesty to request them to formally adopt Töben as a "prisoner of conscience" which, in ordinary meaning, is what he was. In a long letter Amnesty declined, declaring that in 1995 the organisation decided at a meeting of its International Council - the highest decision making body of Amnesty International - that it would exclude from prisoner of conscience status not only people who have used or advocated violence, but also people who are imprisoned "for having advocated national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.". The decision codified Amnesty International's intention to exclude from prisoner of conscience status those who advocate the denial of the Holocaust and it confirmed what had in fact had been the de facto interpretation of the prisoner of conscience definition contained in Article 1 of Amnesty International's Statute. That seems to say that "those who advocate the denial of the Holocaust" are viewed by Amnesty as thereby advocating "national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence." That is rubbish, an obvious logical non sequitur, empirically contradicted by easy observation; I have never seen such advocacy in the Adelaide Institute newsletter. It is such obvious rubbish that it must be called a lie. Töben is not in the class of an Elie Wiesel, who has incited hatred of Germans, or of Zionists who have incited discrimination and violence against Arabs.

Amnesty has declined to support freedom of expression for Holocaust revisionists for political reasons. It is, therefore, not worthy of respect. The organization's hypocrisy is highlighted by the case of Nelson Mandela, who during his sabotage trial in South Africa in 1964, admitted that he believed in violence to achieve his political objectives and for that purpose had been a leader of a campaign of sabotage. Mandela was a hot subject of debate at Amnesty's meeting in September 1964 because, while the overwhelming sentiment was to continue to support him, one of the rules pertaining to the prisoner of conscience category was that those who used or advocated violence were not eligible. Thus the meeting decided against adopting Mandela thus, but it also voted for supporting him anyway.[5] A mere label

was withheld, not the support. Töben needed the support more than the label.

Thus we see in the Töben case hypocrisy at high levels of contemporary public life, but I opened by promising "the greatest dirty open secret of our day", and I have yet to explain.

Like the study of taboos, the study of hypocritical exceptions to agreed norms is highly instructive on the real, as opposed to declared, values of a society. That free expression of ideas must be a fundamental value of the sort of society we purport to be has virtual unanimous support, at least in the abstract. True, the ideal of free expression must be qualified in various ways, for example by national security laws and restrictions against distribution of pornography in some circumstances. However it is hard to make even a bad case for censorship of the history of the remote past unless that history impacts in some way on the present; in such event bad cases can be and are made.

The past and the present are linked, in the case of Holocaust revisionism, by Zionism. Many Israeli leaders agree that the Holocaust is "what this country's all about."[6] That statement is more true than the speaker intended, because apart from Zionism's obvious contemporary exploitation of the Holocaust legend, there is the lesser known role that Zionism played in establishing, during the years 1942-1948, the legend that was to become its life blood, as I have discussed at length elsewhere. However even that is not the "greatest dirty open secret of our day".

It is widely imagined that the various national-socialist movements that flourished in Europe more than 50 years ago are dead, but that is not true. Yes, gone are not only Hitler's Nazis and Mussolini's Fascists, but also the British Union of Fascists, the Croatian Ustashe, the Hungarian Arrow Cross, the Romanian Iron Guard, the Parti Populaire Français, and all such national-socialist movements except Zionism, a movement born and nurtured in Europe during the heyday of nationalism and socialism, and which is quite vigorous today. Its völkisch principle, that of the "chosen people", is the oldest and best tested extant.

Despite occasional rhetoric by various governments and organizations like Amnesty International, for example against torture of prisoners, Israel and thus Zionism are essentially untouchable in international affairs. One cannot imagine, for example, Israel being treated harshly for defying UN resolutions, even with measures less severe than those used against Iraq during the past decade. Our institutions not only support Israel as a state, they also support Zionism in domestic policy by means tailored for each country. In Europe critical examination of Zionism's sustaining legend is outlawed.

That is not the case in the USA, for constitutional reasons, but US institutions look kindly on this European repression nevertheless. There are occasional references in the US press to the European anti-revisionist laws, but I have never seen an editorial condemnation of them from these editors who so righteously scold China for its human rights violations. A frightening episode occurred in 1993 and 1994, when FBI Director Louis Freeh held talks with the German Bundesamt für Verfassungsschutz (Federal Office for Protection of the Constitution), the euphemistically named agency that performs many of the functions once entrusted to the more honestly named Geheime Staatspolizei (Gestapo or Secret State Police). The talks sought to find ways the US could stop the flow, from the USA to Germany, of literature banned by German law but lawful in the USA.[7] The talks seem to have come to nothing but the point was clearly made that the USA approves of such German repression of civil liberties. The role of the USA in supporting Israel diplomatically, financially and militarily is well known. The USA is also the mainstay of the operation of the related Holocaust restitution racket.

Thus the institutions of some major Western countries, flouting established legal and ethical norms, are as intellectually repressive as anybody's Gestapo, in enforcing service to the only surviving European national-socialist movement, and the others are tacitly or even openly supportive of that repression. That is the greatest dirty open secret of our day.

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[1] Adelaide Institute newsletter, Jan. 1998, pp. 1,8.

[2] Adelaide Institute newsletter, Feb. 1998, p. 10.

[3] http://pubweb.nwu.edu/~abutz

[4] Prisoners of Conscience, Amnesty International Publications, London , 1981, pp. 1-2.

[5] Egon Larsen, A Flame in Barbed Wire, Frederick Muller, London, 1978. Also W.W. Norton, NY, 1979.

[6] Efraim Zuroff, Israel director of the Simon Wiesenthal Center, quoted in the New York Times, 14 January 1995, p. 6.

[7] Chicago Tribune, 15 Dec. 1993, sec. 1, pp. 1,16; 19 Dec. 1993, sec. 1, p. 4; 27 June 1994, sec. 1, p. 4. Publicly the talk was about stopping "neo-Nazi" propaganda but that is a common camouflage or package term when Holocaust revisionism is a target that it would be inexpedient to identify.